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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

JOSEPH F. AGOSTINO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition For Writ of Certiorari to The
Seventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an alleged bribe of an employee of a state agency can be prosecuted under 18 U.S.C. § 666 where no federal funds are or could be, directly or indirectly, implicated by the conduct of the employee.

2. Whether the $10,000 jurisdictional limit of 18 U.S.C. § 666 applies at a fairly specific agency level rather than in an umbrella fashion so as to encompass all state agencies, so long as one agency receives federal funds.

3. Whether an indictment charging a crime under 18 U.S.C. § 666 violates the Fifth Amendment when it does not state what transaction the alleged briber was intending to influence.

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REFERENCE TO THE OPINION OF THE COURT BELOW

The Court of Appeals Opinion can be found at 132 F.3d 1183 (7th Cir. 1997) and is reproduced in the Appendix A to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Seventh Circuit rendered its opinion on December 22, 1997. The time for filing the Petition for Writ of Certiorari expires on March 23, 1998. The Supreme Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254. The notification requirements of Rule 29.4 have been satisfied as reflected in the Proof of Service.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The text of 18 U.S.C. § 666 is set forth in Appendix B.

STATEMENT OF THE CASE

Joseph F. Agostino was charged on October 2, 1996 with one count of violating 18 U.S.C. § 666(a)(2) for allegedly bribing his subordinate James Goetz, the Patron Services Manager for the Indiana Toll Road, namely by corruptly offering him $4,000 "with intent to influence and reward [Goetz] in connection with the business, transaction, or series of transactions" at the Toll Road.

Defendant was convicted on February 14, 1997 after a jury trial. Defendant's conviction was appealed to the Seventh Circuit. Jurisdiction of the Seventh Circuit was premised on 28 U.S.C. § 1291. On December 22, 1997, the Court of Appeals issued its opinion affirming the conviction. *See Appendix A*.

Defendant was the Administrative Services Manager at the Toll Road Division. As Patron Services Manager for the Toll Road Division. Goetz acted as a liaison between Toll Road management and approximately 34 trucking companies and vendors.

The Indiana Toll Road is owned by the Indiana Transportation Finance Authority (ITFA). The Indiana Department of Transportation (InDOT) operates the Toll Road as a division pursuant to a lease with the ITFA.

The Toll Road is operated as an independent, self-supporting, profit-making business, grossing revenues in excess of $70,000,000 per year. For legal, accounting and budget

purposes, the Toll Road Division, by state law, is treated as a separate agency. Toll Road funds are not intermingled with any other InDOT funds, and its financial performance is audited separately from InDOT. Unlike any other InDOT division, payroll funds for Toll Road employees are kept separate from other InDOT funds.

While InDOT has received substantial amounts of federal funding, neither the ITFA nor the Toll Road Division has received any federal funding.

The Indictment did not give any indication of what Goetz was allegedly bribed to do, whether it was to reward Goetz for a past corrupt act or to influence him to commit a future corrupt act, what vendor or trucking company (if any) might be involved, or what part of the $70,000,000 annual business of the Toll Road Division might be involved. It recited only that defendant

> . . . did knowingly and corruptly offer and give [money to Goetz] with intent to influence and reward [Goetz] in connection with the business, transaction, or series of transactions of the Indiana Department of Transportation, Toll Road Division, involving something of value of $5,000 or more.

Three times before trial, defendant moved to dismiss the Indictment for its failure to specify anything as to how the $4,000 could have constituted a bribe, including any indication of what it was that the government claimed Goetz was being bribed to do, whether Goetz was being influenced regarding a future act or being rewarded for a past act, or how in any way the payment was "corrupt" under the statute.

The government responded with a series of positions. Its initial position was that there was no need to show that a *quid pro quo* was intended by defendant, that the defense was engaging in a "smoke screen" tactic by even raising the issue, and that the concern was "much ado about nothing" In fact, the government represented that this was the simplest of cases with no *quid pro quo* to be concerned about:

> This case is simple and it relates to a single incident on a single date that the defense knows exactly what is at stake, and it is beyond me why they filed a motion for a bill of particulars, why they filed a motion to dismiss, when they know the exact time and incident and participants in this particular offense.
>
> This has to do with the offer of money by Mr. Agostino to Mr. Goetz employed by the Toll Road on a particular date in July. There is nothing more to it. It can't get simpler than this.

Tr. of 12/20/96 hr'g, p. 5.

On the basis of the government's representations of a simple, no *quid pro quo* case, the initial defense motions to dismiss and for a bill of particulars were denied.

A second government position emerged when it was called upon to explain its Rule 16(a)(1)(E) pre-trial summary of an expert report by one Fred Graessle containing a series of calculations regarding the randomness *vel non* of the gas station surveys to determine Toll Road fuel prices.

Upon receipt of the government's Rule 16(a)(1)(E) letter

to this effect, the defense renewed its motion to dismiss on the grounds that no such theory was found in the Indictment (or could even be squared with the government's earlier claims of no intended *quid pro quo* for the $4,000 tender). The government responded that the Indictment could suffice because Graessle's testimony was simply going to "assist the government in proving the defendant's intent to influence Mr. Goetz in connection with INDOT, Toll Road Division business and transactions." The renewed motion was accordingly denied.

At trial, the government offered yet a third version of its case in its opening statement. At that time, the government claimed that the $4,000 was tendered to secure both (1) the change in the gas survey selection process and (2) non-revenue tanker passes for Gas City in its delivery of fuel to the Toll Road stations. Neither of these was suggested by the Indictment, and the latter was unaddressed even in any pre-trial pleading by the government. It was the government's contention in its opening statement that defendant could not accomplish these benefits for Gas City alone and that he could not have done so without the involvement of his subordinate Goetz. Goetz testified, however, that he was not bribed or influenced in any way to be a part of any changes in the administration of the Gas City contract; he wasn't even asked to be quiet about the changes that were made.

Goetz did not know what the $4,000 was for, and he continued to speculate about it. In fact, he acknowledged that while it could have been in connection with the fuel surveying or the non-revenue passes, those matters were over and done with well prior to the appearance of the $4,000 in July 1995, and the money could have been a test of his honesty. Goetz even admitted to several reasons proffered for testing his honesty (gambling, unauthorized favors).

Goetz vacillated among these three possible motivations for defendant tendering to him the $4,000 (something to do with the surveys, something to do with the non-revenue passes, and a test of Goetz's honesty), and he did not know which of these was the case.

Faced with this evidence (including the fact that the money did not appear until the month after the fuel survey and non-revenue passes matters), the government in closing arguments abandoned the claim that defendant needed Goetz to make any changes in the relation between the Toll Road and Gas City. Instead the government argued a fourth version of what the $4,000 tender had been meant to accomplish -- keeping Goetz quiet. Goetz reported nothing in his testimony regarding any request by defendant that he remain quiet. A number of people were aware of changes in pricing survey process, including Goetz' personal secretary, who had been involved on a daily basis in administering the Gas City contract; she was never asked to be quiet, let alone bribed.

Finally, a fifth government theory emerged at sentencing. By that time, the government argued that in addition to all of the other possible theories of the $4,000 as a bribe, Goetz was also offered this bribe in an attempt to compromise him so that he could be threatened with some retaliation or blackmail if he should ever disclose or complain about the improper benefits given to Gas City and the improper and wrongful actions taken by Joseph Agostino and others including John Piraccini in the second half of 1995.

ARGUMENT IN SUPPORT OF WRIT

Reasons for Granting Writ

The Seventh Circuit decision has decided an important question of law regarding the scope of 18 U.S.C. § 666 which has not been, but should be, settled by the Supreme Court; the scope of 18 U.S.C. § 666 as determined by the Seventh Circuit also conflicts with the scope as determined by the Second Circuit and the Ninth Circuit. United States v. Foley, 73 F.3d 484 (2d Cir. 1996); United States v. Wyncoop, 11 F.3d 119 (9th Cir. 1993).

The Seventh Circuit decision is in conflict with decisions of the Fifth, Second, and Sixth Circuits, in determining the specific agency level at which the jurisdictional element of 18 U.S.C. § 666 must be satisfied. United States v. Moeller, 987 F.2d 1134 (5th Cir. 1993); United States v. Foley, 73 F.3d 484 (2d Cir. 1996); United States v. Valentine, 63 F.3d 459 (6th Cir. 1995).

The Seventh Circuit has also decided an important issue regarding the U.S. Attorney's usurpation of the Grand Jury's Fifth Amendment role in a manner that conflicts with this Court's prior rulings in Russell v. United States, 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962) and United States v. Miller, 471 U.S. 130, 105 S. Ct. 1811, 85 L. Ed. 2d 99 (1985). The Seventh Circuit's holding also cannot be reconciled with the decision in United States v. Murphy, 762 F.2d 1151 (1st Cir. 1985).

The Seventh Circuit expanded the purview of 18 U.S.C. § 666 beyond its intended scope, conflicting with the view taken by several other Circuits.

The Indictment alleged and the evidence at trial showed that Goetz was an agent solely of the Indiana Toll Road Division. Although the Toll Road Division is under the umbrella of the Indiana Department of Transportation, the Toll Road Division is a separate state agency. Since the Toll Road Division did not receive any federal funds, this case does not fit within the scope of 18 U.S.C. § 666.

As Patron Services Manager for the Indiana Toll Road, Goetz performed work duties related solely to the Toll Road, not INDOT.

The responsibility for the well-being of the Toll Road rested with the Indiana Transportation Authority (ITFA). The financial performance and records of the Toll Road Division were audited separately from INDOT. In audited financial statements, it is represented that the Indiana Toll Road is a component unit of the Indiana Transportation Finance Authority. The Toll Road Division operates out of separate facilities than does INDOT, has approximately 500 employees, and has its own manager. Toll Road employees are paid from a payroll fund exclusively established for Toll Road employees; payroll funds for Toll Road employees are paid after a requisition for funds is made by the general manager of Toll Road Division, and the Trustee under the indenture approves the payment. INDOT employees are paid by the Auditor of the State.

A Trust Indenture Agreement between and among the Indiana Transportation Finance Authority, the Indiana Department of Transportation and a bank dictates the way the Toll Road Division functions, not InDot.

Indiana statutes create an impenetrable barrier between the funding of InDOT and the funding of the Toll Road. InDOT operates the Toll Road pursuant to a contract with the ITFA whereby the Toll Road is to be managed as a unit separate and apart from any other district or division of InDOT. I.C. § 8-9.5-8-6(c)(4). Tolls and other revenues collected by the Toll Road Division are segregated from all other funds under InDOT's control. InDOT must make a separate accounting of all receipts and disbursements for the Toll Road. I.C. 8-9.5-8-7(c)(4), 8-9.5-8-8(c)(7). Toll collections are to be deposited to the account of the ITFA or its trustee, not InDOT. I.C. 8-9.5-8-7(c)(1). The ITFA is required to maintain a revolving fund balance so that InDOT will not have to advance funds for Toll Road costs. I.C. 8-9.5-8-7(c)(6). These costs include construction, improvement, maintenance, repair, operation, salaries, wages, and associated costs of department personnel. I.C. 8-9.5-8-7(c)(5).

InDOT is prohibited by state law from using its funds for the Toll Road. I.C. 8-14-1-3(5). Both I.C. 8-9.5-8-7(c)(5) and (6) make it clear that the costs of any services provided to the Toll Road Division by InDOT are to be paid from the revolving fund established by ITFA for the operation of the Toll Road.[1]

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[1]The provision of services, when those services are compensated, does not implicate federal funds, even where the direct provider of funds is the federal government. *See* 18

Federal funds administered by InDOT are accessible from InDOT only by application from an agency. I.C. 8-23-3-3.[2] The Toll Road Division has never applied for federal funds from InDOT, nor received federal funds from any federal program. Hence, the operation of the Indiana Toll Road simply does not put any InDOT funds or federal funds at risk.

By its very terms, § 666 is a statute of limited jurisdiction, and jurisdiction should not be attained through strained or forced statutory interpretation. United States v. Bowman, 260 U.S. 94, 102 (1922); United States v. Stewart, 727 F. Supp. 1068, 1073 (N.D. Tex. 1988) (construing § 666 and stating, "It is not up to the Court to stretch the statute to encompass [an] offense.").

In enacting § 666, Congress was attempting to fill two gaps in existing legislation. First, under 18 U.S.C. § 641, which proscribed the theft of property "belonging to the United States," theft of money distributed under federal programs could not be prosecuted if title to the funds had either passed to another entity or became so commingled with other assets that the "federal character" of the funds could not be shown. *See* S.Rep. No. 98-225, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3510-11. Second, the existing federal bribery statute, 18 U.S.C. § 201, was inadequate to ensure the integrity of federal programs because individuals administering the funds but employed by other entities had not

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U.S.C. § 666(c).

[2]The term agency is defined to include the term division. *See* I.C. 4-21.5-1-3, 4-22-2-3, 8-23-1-10.

been found to be "[f]ederal officials" as required under the statute.

The Senate Report specifically states that the new statute, § 666, was intended to fill these gaps and "protect the integrity of the vast sums of money distributed through federal programs from theft, fraud, and undue influence by bribery." Id. at 3511. The emphasis was on protecting federal funds. The report lists three specific cases to which § 666 was intended to apply.[3] In each of these cases, there was an issue as to whether an individual administering federal funds was a "federal official" who could be prosecuted under § 201.

There is no indication in the history of § 666 that Congress intended federal law enforcement agencies to police the financial affairs of entities that do not administer federal funds. United States v. Wyncoop, 11 F.3d 119, 122 (9th Cir. 1993).

The legislative history of 18 U.S.C. §666 makes it clear that federal jurisdiction must be founded on a specific statutory scheme, not on brochures, letters, or paychecks:

> The term "Federal program" means that there must exist a specific statutory scheme

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[3]The cases mentioned were United States v. DelToro, 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826, 96 S. Ct. 41, 46 L. Ed. 2d 42 (1975); United States v. Hinton, 683 F.2d 195 (7th Cir.), *aff'd sub nom.*, Dixson v. United States, 465 U.S. 482, 104 S. Ct. 1172, 79 L. Ed. 2d 458 (1982); and United States v. Mosley, 659 F.2d 812 (7th Cir. 1981). 1984 U.S.C.C.A.N. at 3511.

> authorizing the Federal assistance in order to promote or achieve certain policy objectives.

S. Rep. No. 98-225, at 369 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3511. The specific statutory scheme for allowing federal funds to reach the Indiana Toll Road requires the Indiana Transportation Finance Authority to apply for the funds[4], and applications for the federal funds must be made by each agency separately, subject to approval of INDOT[5]. Under the relevant, specific statutory scheme, federal funds received by INDOT cannot be used for the Indiana Toll Road.[6]

In United States v. Foley, 73 F.3d 484, 490-91 (2d Cir. 1996), the Second Circuit held that the government is not "required to trace the agent's corrupt expenditures to the federal program funds; but . . . there was no violation [of 666(a)(1)(B)] where the preservation of federal funds was not implicated by the defendant's conduct."

> Plainly some briberies of state officials may come within the scope of Sec. 666(a)(1)(B), but we infer from the legislative history that that

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[4]I.C. 8-15-2-5(9) empowers the Transportation Finance Authority to apply for federal funds.

[5]I.C. 8-23-3 requires each agency seeking federal highway funds to submit such applications for approval from INDOT.

[6]I.C. 8-14-1-3(5) provides: "Money in the [InDot Highway funds] may not be used for any toll road or toll bridge project."

> section was not designed for the prosecution of corruption that was not shown in some way to touch upon federal funds.

United States v. Foley, 73 F.3d 484, 494 (2d Cir. 1996).

When evaluating the scope of a federal criminal statute, the court must look to its language, history, and purpose. Dowling v. United States, 473 U.S. 207, 214-18, 105 S. Ct. 3127, 3131-34, 87 L. Ed. 2d 152 (1985); Bifulco v. United States, 447 U.S. 381, 387, 100 S. Ct. 2247, 2252, 65 L. Ed. 2d 205 (1980). The Supreme Court has directed the courts to use restraint in interpreting federal criminal statutes based "on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." Dowling, 473 U.S. at 214, 105 S. Ct. at 3131.

It is undisputed that concerning criminal law in general the States have primacy. "We have also spoken of comity and federalism. 'The States possess primary authority for defining and enforcing the criminal law....' " Brecht v. Abrahamson, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). It cannot be presumed that Congress intended in section 666 to vastly expand federal criminal jurisdiction to reach virtually all bribery involving state and local officials without any mention in its text, statutory findings, or legislative history. Before courts may construe a federal criminal statute to so fundamentally alter the relationship between federal and state governments, Congress must have clearly stated its intent to do so. U.S. v. Bass, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971). Congress has made no such statement here. Application of § 666 to the present situation would thus clearly go beyond the scope Congress intended it to have and would disrupt the balance of power between the states on the federal

government.

The manifest purpose of § 666 is to safeguard finite federal resources from corruption and to police those with control of federal funds. No federal funds were at stake as a result of the alleged bribe. No one in control of federal funds was involved with the alleged corrupt transaction. The funds of InDOT, the agency that did receive federal funds, were in no way affected due to the statutorily imposed segregation of Toll Road and InDOT funding. And because the Toll Road Division received no federal funding, there was no direct involvement of federal funds.

The Seventh Circuit has not exercised restraint in interpreting 18 U.S.C. § 666, but rather has taken one of the most expansive views possible. In doing so, the court below has opened the door to letting the federal government police conduct that was traditionally policed by the states. When, as in this case, no federal funds can be implicated because the state receiving the funds has gone to great lengths to segregate those funds such that they could not be implicated, principles of federalism require the federal government to stay away.

The Seventh Circuit Did Not Look to the Appropriate State Agency in Determining Whether the Jurisdictional Element of 18 U.S.C. § 666 Has Been Satisfied

The Seventh Circuit ignored the fact that the Toll Road Division is a separate state agency, distinct from InDot, and ignored the fact that Goetz performed duties only for the Toll Road Division. In so doing, the Seventh Circuit failed to determine that the jurisdictional limit of Section 666 was satisfied at the level of the specific agency for which Goetz worked. This approach is inconsistent with the approaches used

by the Fifth and Sixth Circuits.

The statute here, 18 U.S.C. § 666, requires receipt in excess of $10,000 or more in federal benefits by the agency whose agent is involved in the corrupt transaction. 18 U.S.C. § 666(b). "Agency" is defined to include a subdivision of the executive branch of government. 18 U.S.C. § 666(d)(1). This broad definition plainly encompasses InDOT and the Toll Road Division, both of which are government agencies. However, the Toll Road Division did not receive federal funds while InDOT did. The statute does not specify how to select one agency over the other in determining the question of jurisdiction. Any ambiguity in construing this statute should be resolved in favor of the defendant under the rule of lenity. Rewis v. United States, 461 U.S. 808, 812 (1971).

Other courts, when faced with the issue of jurisdiction where more than one agency was involved, have concluded that the relevant inquiry must first focus on the agent, not the interrelationship of the agencies. Both the Fifth and Sixth Circuits make it clear that when two interrelated agencies are involved, the court must determine which agency's employee the defendant was trying to influence.

In United States v. Moeller, 987 F.2d 1134 (5th Cir. 1993), the court rejected the government's argument that jurisdiction could be determined by looking to the federal assistance that the Texas Department of Agriculture (TDA) received where officers of the Texas Federal Inspection Service (TFIS) were indicted under 18 U.S.C. § 666. The TFIS was supervised by TDA, but did not receive federal funding. The Moeller court decided the issue of the relevant agency by focusing on the role of the agent. 987 F.2d at 1137.

In finding that TFIS employees were agents of the TDA, the court looked to the fact that TFIS employees enforced TDA regulations and that TFIS funds could revert to the TDA. In this case, regulations for InDOT and regulations for the Toll Road, by state law, are deliberately set forth in entirely different sections of the Indiana Administrative Code.[7] Moreover, as discussed above, funds of the Toll Road and funds of InDOT are segregated. Thus, under the analysis in Moeller, the relevant agency is the Toll Road Division because Goetz was an agent solely of the Toll Road Division and performed no functions for InDOT. The Toll Road Division did not receive federal funds and § 666 should not apply.

In United States v. Valentine, 63 F.3d 459 (6th Cir. 1995), the court noted that the defendant was an agent of both city government and the water department, in analyzing the issue of jurisdiction. The court also stated that the government must show that the elements of § 666(a)(1) occurred during a time in which both the city and the water department received in excess of $10,000 in any one year from a qualifying federal assistance program. Valentine at 462.

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[7]The regulations for the Indiana Toll Road are set forth in Title 135 of the Indiana Administrative Code, as part of the regulations of the Indiana Transportation Finance Authority. The regulations pertaining to the Indiana Department of Transportation are set forth in Title 105 of the Indiana Administrative Code. Effective April 1, 1983, all regulations relating to toll roads were transferred to the Indiana toll finance authority pursuant to P.L. 109, Section 3 (I.C. 8-9.5-8-14). *See* Note to 120 IAC 6.

One persuasive case following the analysis employed in Valentine is United States v. Frega, 933 F. Supp. 1536 (S.D. Cal. 1996). Frega involved a number of charges, one of which was a charge under 18 U.S.C. § 666(a)(2) against a lawyer who gave former judges gifts with the intent of influencing them in regard to cases in which they were presiding. The Frega court dismissed the § 666 count of the indictment because the alleged conduct did not appear to have threatened, either directly or indirectly, federal funds. Frega at 1543. In reaching this conclusion, the Frega court correctly identified the problem in giving a broad scope reading to § 666:

> [I]t would drastically change the balance of power between federal and state governments by bringing conduct that had previously been entirely in the realm of the states within the federal purview. Yet, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Bass, 404 U.S. at 349, 92 S.Ct. at 523.

Frega at 1540.

The Frega court went on to correctly proclaim, based on its survey of published cases involving § 666, including Valentine, that courts have required the $10,000 funding to be shown to exist at a fairly specific level, and not at the general governmental level. Frega at 1542. "This specificity is significant in that it reinforces the view that § 666 was intended to protect the integrity of federal funds, and not as a general anti-corruption statute." Frega at 1542.

This argument, moreover, is not the so-called tracing argument rejected in United States v. Westmoreland, 841 F.2d

572 (5th Cir. 1988), United States v. Simas, 937 F.2d 459 (9th Cir. 1991), and United States v. Coyne, 4 F.3d 100 (2d Cir. 1993). In each of these cases, the corrupt transaction involved an agent of an agency that did receive federal funds, but the defendants argued that the government needed to show that federal funds were involved in the corrupt transaction. The courts in those cases rejected the tracing requirement because the plain language of the statute merely required that the agency whose agent was involved in the corrupt transaction receive federal benefits in excess of $10,000.

In the present case, federal funds are not impinged in any way because the agency for which Goetz was an agent, namely the Toll Road Division, did not receive federal funds at all. Moreover, the Indiana Toll Road is a project of the Indiana Transportation Finance Authority, not InDOT. The Indictment did not allege and the evidence did not show that the Transportation Finance Authority received any federal funds.

Under the correct analysis employed by Moeller and Valentine, and relied upon by Frega, the Seventh Circuit should have looked at the specific agency level, and not at the general governmental level.[8] Instead, the Seventh Circuit wrongly concluded that Goetz was an agent of InDot because InDot

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[8]United States v. Delano, 55 F.3d 720 (2d Cir. 1995) did not consider this issue, but rather focused on whether a jury instruction amounted to a constructive amendment of the indictment. A better summary of the Second Circuit's view of the scope of § 666 is set forth in United States v. Foley, 73 F.3d 484, 491 ("we have held that there was no violation . . . where the preservation of federal funds was not implicated by the defendant's conduct . . . .").

signed the lease between the ITFA and InDot. Such thinking would also make Goetz an agent of the Indiana Attorney General's Office, which also signed the lease. The lease dealt solely with the operation of the Toll Road and did not involve any InDot funds. The contract principally provided revenues to the Toll Road Division. In performing duties under the contract, Goetz was in no way authorized to exercise control over InDot or InDot funds. Thus, it can only be concluded that Goetz was specifically an agent of the Toll Road Division. The Toll Road Division received no federal funds and federal jurisdiction cannot be invoked under § 666 given these circumstances.

The indictment's failure to specify what transaction was involved in the attempted bribe allowed the U.S. Attorney to amend the indictment at will, usurping the role of the Grand Jury.

The Indictment in this case failed to state the purpose of the alleged bribe and merely parroted the intent language in the statute. The Indictment also failed to identify what transaction the defendant was trying to influence. As a result, the Indictment left the government free to argue alternative theories of the purpose of the bribe, and it took full advantage of this opening, presenting at least five distinct and exclusive theories of the purpose throughout the proceedings.

By allowing the government to continually change theories, even in closing argument, the Indictment failed to provide adequate notice of the charges against defendant so that he could prepare his defense. It also provided no guarantee that the offense found by the grand jury was the same offense for

which defendant was convicted, or that the petit jurors unanimously agreed on the offense committed by defendant. In effect, the lack of specificity allowed the Government the opportunity to amend the indictment as it saw fit without deference to the Fifth Amendment.

The mere tracking of the language of a statute is not sufficient when additional information is required to apprise a defendant of a specific charge against him. United States v. Hinkle, 637 F.2d 1154, 1157 (7th Cir. 1981), *citing* Russell v. United States, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962).

The flaw in the Seventh Circuit's ruling regarding the adequacy of the indictment is best exposed in its comment that no one knows better than Agostino what his intent was. This statement suggests that in the view of the court below, it is sufficient to notify an accused that he has been charged with a crime; there is no need to tell him what law he violated because "he knows what he did." The Fifth Amendment was meant to protect against precisely this type of tyranny.

When an intent to influence another person is an essential element of an offense, as is the case in § 666, United States v. Medley, 913 F.2d 1248 (7th Cir. 1990), *cert. denied*, 510 U.S. 1013, 114 S. Ct. 604, 126 L. Ed. 2d 569 (1993), the indictment must specifically allege what act or acts the defendant intended to influence. In United States v. Murphy, 762 F.2d 1151 (1st Cir. 1985), the court reversed a conviction for threatening a witness under 18 U.S.C. § 1512 on the grounds that the indictment did not specify what proceeding the defendants intended to influence, only that they threatened "Richard Watson, a witness in an official proceeding." Id. at 1153. Since the person threatened in Murphy was a witness in

two official proceedings, the defendant had no way of knowing which proceeding he allegedly sought to influence. As in the present case, the court noted that the vagueness in the indictment gave the prosecution an unfair advantage by allowing it to change its theory during trial. Id. at 1154-55.

Likewise, in United States v. McDonnell, 696 F. Supp. 356 (N.D. Ill. 1988), the court dismissed a RICO count against a judge based on a predicate act of bribery because the indictment failed to identify the attorney who offered the bribe or the case with which that attorney was affiliated.

In United States v. Sorrell, 473 F.2d 1054 (7th Cir. 1973), the Court found defective an indictment which alleged that defendant failed to comply with instructions, rules, and procedures prescribed for military registrant processing in violation of 50 U.S.C. App. § 462 given the indictment's failure to specify which instructions, rules, and procedures the defendant failed to follow. Id. at 1056.

The indictment in United States v. Medley, 913 F.2d 1248 (7th Cir. 1990), *cert. denied*, 510 U.S. 1013, 114 S. Ct. 604, 126 L. Ed. 2d 569 (1993) illustrates, in stark contrast to the Indictment in the case at bar, the type of factual allegations necessary in an indictment charging a violation of § 666. In addition to using the statutory language, the indictment in Medley identified the specific transactions which defendant intended to influence.

The failure to specify what acts defendant intended to influence is not a mere technical flaw. On the contrary, the requirement of specificity is a critical safeguard of many of defendant's fundamental rights. The present case demonstrates the many essential purposes of a specific indictment, some of

which closely parallel the purposes behind the prohibition against duplicity in criminal charges:

> 1. [P]rotecting a defendant's right under the Sixth Amendment and Rule 7(c) to notice of the "nature of cause of the accusation" against a defendant so that he or she may prepare a defense;
>
> 2. [I]nsuring that if defendant is convicted, the offense upon which he or she is convicted will clearly appear from the verdict, so that appropriate punishment may be imposed;
>
> 3. [A]voiding the situation in which a defendant may be convicted without unanimous juror agreement as to any of the offenses charged in the count in question . . . .

Moore's Federal Practice Digest, 3d ed., vol. 24, § 608.04[1].

The Indictment in this case permitted the government to rely on five different theories concerning what defendant allegedly intended to influence Goetz to do (or reward Goetz for having done).

The prosecution began with the government's pre-trial defense of the adequacy in the Indictment by stating that the case involved only a single transaction, on a single day, between only Mr. Goetz and Mr. Agostino, "with nothing more to it," (Tr. of 12/20/96 hr'g, p. 5), and ended with the government claiming that the actions were part of a conspiracy to cover up unspecified "improper and wrongful actions" taken not just by Joe Agostino but by John Piraccini and unidentified "others"

over a six-month period in 1995 (Mot. of Def. for New Trial, 3/17/97, Ex. "A").

The prosecution began with the government's flat assertion that (notwithstanding United States v. Medley, supra,)[9] there was no *quid pro quo* for the $4,000 tender and ended with the government claiming that there was at least a $250,000 *quid pro quo* and perhaps even a $2,000,000 *quid pro quo*. (Tr. of sentencing hr'g, 4/22/97, p. 54.)

A variety of constitutional protections were sacrificed as a consequence:

1. The case was submitted to the petit jury with no assurance that any of the government's mercurial allegations had been adopted by a majority vote of the grand jury, the only body with the authorization to bring a federal felony charge. *See* U.S. Const. amend. V; United States v. Miller, 471 U.S. 130, 105 S. Ct. 1811, 85 L. Ed. 2d 99 (1985); Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); Ex parte Bain, 121 U.S. 1, 7 S. Ct. 781, 30 L. Ed. 849 (1887); Fed. R. Crim. P. 7(a).

2. The government enjoyed unlimited opportunities to effectively amend its Indictment simply because the Indictment carried no apparent shape or definition. *See* United States v. Leichtnam, 948 F.2d 370 (7th Cir. 1991) (containing a definitive discussion of the unconstitutionality of such a

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[9]"The essential element of a section 666 violation is a 'quid pro quo'; that is, whether the payment was accepted to influence and reward an official for an improper act." Medley at 1260.

practice). When defendant proved his innocence of one of the government's theories, the government just moved on. Indeed, since the government did not present its argument that the $4,000 was hush money until closing argument (and did not present its blackmail theory until sentencing), defendant was denied the opportunity to cross-examine witnesses or present evidence of his own regarding these theories. If defendant had been on notice that this was going to be the government's theory, defendant would have, at the least, presented evidence that many other personnel at the Toll Road were aware of the change in the surveying procedure or the issuance of the non-revenue passes, and thus there was nothing to keep quiet.

3. A verdict was returned carrying with it no assurance of jury unanimity; in fact, each of the government's theories could have been rejected by a majority vote, and certainly not adopted by a unanimous vote. *See* Johnson v. Louisiana, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972); United States v. Kimberlin, 81 F.2d 1247, 1250 (7th Cir. 1985); Moore's Federal Practice Digest, supra.

4. To this day, no one is left with any remotely confident sense of what defendant was convicted of -- with the government initially claiming that there was no intended (or actual) *quid pro quo* but by the time of sentencing arguing that the loss in the case was "no less than $250,000," but that "it could reasonably be argued . . . that the amount of money is in excess of $2,000,000 here." (Tr. of sentencing hr'g, p. 54.) (For sentencing purposes, the court held the government to its earlier stated position that there had been no *quid pro quo* in the case and found no loss to a victim, (Tr. of sentencing hr'g, p. 83), but, of course, the damage to defendant's trial rights was complete.) *See* Moore's Federal Practice Digest, 3d ed., vol. 24, § 608.04[1], quoted above at pp. 16-17.

6. Finally, the government's ability to dodge any requirement of alleging and proving a static claim allowed it to effectively shift the burden to defendant to prove his innocence.

CONCLUSION

For the above stated reasons, the Petition for Certiorari should be granted.

Dated: March 19, 1998

Respectfully Submitted,

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APPENDIX A

Opinion of the Court Below

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No.97-2105 & 97-2340

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

v.

JOSEPH F. AGOSTINO,

Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No.96 CR 42--**Allen Sharp**, *Judge.*

ARGUED SEPTEMBER 24, 1997--DECIDED DECEMBER 22, 1997

Before RIPPLE, MANION and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* A jury found Joseph F. Agostino guilty of corruptly giving a $4,000 payment to a subordinate in the Toll Road Division of the Indiana

Department of Transportation in violation of 18 U.S.C. § 666(a)(2). He challenges his conviction and sentence on several grounds. With respect to his conviction, Agostino argues that the indictment was insufficient, that the prosecution violated his rights to due process by requesting that a key witness not speak to defense counsel, that the evidence was insufficient to convict him, and that the district court erred in failing to provide certain information to the jury during jury instruction. He challenges his sentence by arguing that the district court sentenced him under an incorrect section of the United States Sentencing Guidelines ("U.S.S.G.").

The Government instituted a cross-appeal challenging the sentence imposed by the district court. Specifically, the Government argues that the district court erred in concluding that the defendant must benefit personally from the bribe in order to merit an upward departure under U.S.S.G. § 2C1 .1(b)(2)(A). The Government also contends that the district court erred by failing to enhance Agostino's sentence for obstruction of justice under U.S.S.G. § 3C1.1, and by sentencing Agostino to a term below the applicable Guideline range. Because we find merit in only the last of these claims, we affirm Agostino's conviction and remand to the district court to sentence him to a term consistent with the Guidelines.

I. HISTORY

Joseph Agostino was Administrative Services Manager of the Toll Road Division of the Indiana Department of Transportation ("INDOT") until January 1996. James Goetz, Agostino's subordinate, was the Patron Services Manager. That position required Goetz to act as a liaison between Toll Road management and approximately thirty-four trucking companies and vendors. Among the vendors was Gas City, the fuel

supplier to Toll Road gas stations since June 1995.

Under the terms of the contract between INDOT Toll Road Division and Gas City, the fuel prices Gas City charged on the Toll Road were set pursuant to a specific procedure. Part of the procedure required INDOT Toll Road Division to select randomly a list of stations from a predetermined pool; Gas City would then survey these stations and use a formula to set the fuel prices on the Toll Road. This fuel pricing process was intended to avoid pricing the fuel either too high or too low. The contract permitted periodic changes in the pool of stations as part of an attempt to set a fair price. In addition to setting forth the procedures for fuel pricing, the contract called for the issue of "non-revenue passes"[1] to certain Gas City management personnel.

Initially the random selection of stations and the calculation of fuel prices proceeded in accordance with the contract. Goetz supervised this process and was responsible for the random selection of stations. In June or July 1995, Agostino told Goetz that the process of setting the fuel prices was cumbersome because it required Goetz to select the survey stations and then fax the names of the selected stations to Gas City for the fuel price calculation. Agostino instructed Goetz that he was no longer responsible for randomly selecting the survey stations and that Gas City would take over the selection. Goetz objected to this arrangement because significant effort had gone into constructing the procedure outlined in the contract. According to Goetz, allowing Gas City to select the stations themselves represented a "substantial deviation" from

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[1]"Non-revenue passes" are passes that enable the user to travel the Toll Road without paying tolls.

the approved procedure. Despite Goetz's objections, Gas City began to make the survey station selections in July 1995.

At about the same time Agostino informed Goetz that Gas City would receive non-revenue passes for all of its fuel tankers. Goetz was surprised at this development because such passes were expected only after Gas City completed its obligations under the contract, and Gas City had only been operating under the contract for approximately one month.

In mid-July 1995, Goetz and Agostino met in Agostino's office at the Toll Road Division. Agostino handed Goetz an envelope containing $4,000 in cash. Agostino told Goetz he was giving him the money because Goetz had been doing a good job and did not make enough money. When Goetz asked where the money came from, Agostino replied that it was "PAC money" and from "Lenny," who Goetz understood to be Len McEnery, the General Manager of Gas City.

Goetz took the money to his office and partially counted it. He then tried to return the money to Agostino, but Agostino's office was locked and his secretary was gone for the day. The next morning Goetz returned the money to Agostino. Agostino claimed that if he returned the money it would simply go to the Lieutenant Governor's campaign, but Goetz refused to keep it.

Agostino does not deny that he offered Goetz $4,000 cash in an envelope in July 1995. However, he disputes that this money was for the purpose of influencing or rewarding Goetz. Instead, Agostino claims that the money was tendered to test Goetz's honesty after concerns arose at the Toll Road Division about Goetz's gambling habits and other activities. Agostino asserts that the money was his own, borrowed from a personal home-equity line of credit. Agostino also admits that he did not

contact any law enforcement agencies, INDOT legal counsel, or Toll Road management prior to engaging in this "test" of Goetz's honesty.

On October 2, 1996, a federal grand jury returned a one-count indictment against Agostino charging him with Bribery Concerning Programs Receiving Federal Funds in violation of 18 U.S.C. § 666(a)(2). Agostino pleaded not guilty on October 30, 1996. Agostino filed multiple pretrial motions including motions to dismiss for lack of specificity in the indictment, motions to dismiss for lack of jurisdiction, and motions to dismiss for alleged governmental interference with a witness. The district court denied all of Agostino's pretrial motions.

On February 14, 1997, after a five-day trial, a jury found Agostino guilty of a violation of § 666(a)(2). Agostino filed several post-trial motions, reiterating the arguments presented in his pretrial motions and adding a motion for acquittal or new trial based on insufficiency of the evidence. The district court denied these motions. At sentencing, the court found that U.S.S.G. § 2Cl.2 applied, which set Agostino's base level at 10. The court then imposed a one level upward departure for the value of the bribe, pursuant to U.S.S.G. §§ 2F1.1(b)(1)(B) and 2C1.1(b)(2)(A). The court found that an additional increase for obstruction of justice was not warranted. At the sentencing hearing, the district court orally sentenced Agostino to four months imprisonment, three years supervised release, $7,500 in fines, and a $50 special assessment. In its sentencing memorandum however the district court indicated a sentence for Agostino of eight months imprisonment, four months to be served in a prison and the remaining four to be included in the term of supervised release. The remainder of the sentence tracked the sentence imposed at the sentencing hearing: three years supervised release, a $7,500 fine, and a special assessment

of $50. The judgment and commitment order issued to the U S. Marshall describes a third sentence: eight months imprisonment, four months to be served in a prison and the remaining four in community confinement. According to the judgment and commitment order, the three years of supervised release begins after the imprisonment and community confinement. The fines and special assessments remained the same.

II. ANALYSIS

A. Sufficiency of the Indictment

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on... indictment of a Grand Jury." U.S. Const. amend. V. The Sixth Amendment then grants certain rights to persons accused of crimes by the federal government, including the right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. The Federal Rules of Criminal Procedure ("Fed. R. Crim. P.") explicate the requirements of an indictment. Fed. R. Crim. P. 7(c)(l) requires that "[t]he indictment. . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

An indictment is constitutionally sufficient and satisfies Fed. R. Crim. P. 7(c)(1) if it states the elements of the crime charged, informs the defendant of the nature of the charge so she may prepare a defense, and enables the defendant to plead the judgment as a bar against future prosecutions for the same offense. *See Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Allender*, 62 F.3d 909, 914(7th Cir. 1995), *cert.*

denied, --U.S.--, 116 S. Ct. 781 (1996). Indictments need not exhaustively recount the facts surrounding the crime's commission. *See Bates*, 96 F.3d at 970. "Generally, an indictment is sufficient when it sets forth the offense in the words of the statute itself, as long as those words expressly set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Hinkle*, 637 F.2d 1154, 1157 (7th Cir. 1981). We review the sufficiency of an indictment *de novo*. *See United States v. Webster*, 125 F.3d 1024, 1029(7th Cir. 1997); *United States v. Bates*, 96 F.3d 964, 967(7th Cir. 1996), *aff'd* --U.S.--, 118 S. Ct. 285(1997).

The specific portion of 18 U.S.C. § 666 with which Agostino was charged provides:

> (a) Whoever...
>
> ....
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent... of a State... government, or any agency thereof, in connection with any business, transaction, or series of transactions of such ... government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.

The indictment issued by the grand jury on October 2, 1996 tracks the language of the statute. The indictment reads as follows:

> In or around July 1995, in the Northern District

> of Indiana, Joseph F. Agostino, defendant herein, did knowingly and corruptly offer and give something of value, specifically, monies, to [James Goetz] with intent to influence and reward [James Goetz] in connection with the business, transaction, or series of transactions of the Indiana Department of Transportation, Toll Road Division, involving something of value of $5,000 or more.
>
> In violation of Title 18, United States Code, Section 666(a)(2).

Relying on *United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990), Agostino first argues that because *quid pro quo* is an "essential element" of a violation of § 666, the indictment is facially insufficient for failing to identify the specific act or acts he was trying to influence by giving Goetz $4,000. In *Medley*, we reviewed jury instructions concerning a violation of § 666(a)(1)(B). The offense in *Medley* was described in the issue instruction "as a prohibition against the giving or receiving of anything of value for the purpose of influencing or being influenced in connection with any business transaction or series of transactions." *Id.* at 1259. The charge failed to note that these actions had to be done "corruptly" as required by § 666(a)(l)(B). *See id.* The court found that in light of the instructions viewed as a whole, "[n]o normal reasonable jury could have misunderstood what the indictment charge was about and what was required to find the defendant guilty." *Id.* at 1261.

The question of whether an indictment must contain specific allegations of a *quid pro quo* was not before the *Medley* court and it did not rule on this issue. The language upon which Agostino wishes to rely appears in the court's discussion of the

distinction between a bribe or gratuity, "which are both illegal under different parts of the statute," *id.* at 1260, and the payment of a legitimate fee. The court stated, "[t]he essential element of a section 666 violation is `quid pro quo'; that is, whether the payment was accepted to influence and reward an official for an improper act." *Id.* at 1260. it is clear from the context that the *Medley* court was not positing an additional element to the statutory definition of the crime, but instead was explaining the *sine qua non* of a violation of § 666. The elements of the offense remain those that are set forth in the statutory language.

Additionally, it is important to note that *Medley* involved a violation of 666(a)(1)(B), which criminalizes the *receipt* of a bribe. The charge against Agostino involves § 666(a)(2), and focuses on the *offer* of a bribe. Therefore, *Medley* is not controlling. We decline to import an additional, specific *quid pro quo* requirement into the elements of § 666(a)(2). Section 666(a)(2), by its statutory language, requires that the defendant act "*corruptly... with intent to influence or reward.*" This intent, and not any specific *quid pro quo*, is what must be alleged in the indictment.[2] Thus, Agostino's indictment

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[2]In denying Agostino's motions to dismiss the indictment for lack of specificity, the district court referred to a recent case from the Eleventh Circuit. In *United States v. Castro*, 89 F.3d 1443 (11th Cir. 1996), *cert. denied*--U.S.--, 117 S. Ct. 965 (1997), the Eleventh Circuit addressed whether, under § 666(a)(2), the Government must show a direct *quid pro quo* relationship between the defendant and the agent of the agency receiving federal funds. In *Castro*, the person receiving the bribes was a middleman, who then exerted influence over an agent of the organization receiving federal funds. On the

is not facially insufficient for failing to include an essential element of the offense.

Agostino's second argument is that the indictment did not sufficiently enable him to prepare a defense. See *Hamling*, 418 U.S. at 117. The crux of Agostino's complaint is that, at the time of the indictment, the Government did not reveal its theory of intent--i.e. the Government did not set forth the specific reason why Agostino offered something of value to Goetz. Agostino asserts that he was unable to prepare a defense without a specific reference to the "business, transaction, or series of transactions of the Indiana Department of Transportation, Toll Road Division, involving something of value of $5,000 or more" involved.

This argument is unpersuasive. "The test for validity is

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facts of that case, the charge would fail if § 666(a)(2) required a *direct quid pro quo* between the defendant and the agent of the organization receiving federal funds. The Eleventh Circuit declined to import a "directness" requirement into § 666(a)(2), stating that "the appellants' narrow reading of the bribery statute would belie the statute's purpose `to protect the integrity of the vast sums of money distributed through federal programs from theft, fraud, and undue influence by bribery.'" *Id.* at 1454 (quoting S. Rep. No.225, 98th Cong., 2d Sess. 369-70(1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11). While it is useful to note the Eleventh Circuit's rejection of a direct *quid pro quo* requirement, our case involves whether § 666(a)(2) requires a statement in the indictment which sets forth the *quid pro quo* action taken by the recipient of the alleged bribe, regardless of whether the *quid pro quo* relationship was a direct one or not.

not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." *Allender*, 62 F.3d at 914. The indictment clearly sets forth the relevant time, person, agency and currency involved in the criminal transaction. This information is sufficient to put Agostino on notice of the conduct for which he was charged. Armed with this knowledge, he had ample opportunity to develop a defense to that charge. Put simply, neither the Constitution nor Fed. R. Grim. P. 7(c)(I) requires the indictment to include the information Agostino seeks. *See United States v. Roya*, 574 F.2d 386 (7th Cir. 1978) (noting that indictment which sets forth elements of offense, time and place of defendant's conduct that constitutes offense, and citation to statute violated satisfies necessary requirements). "The defendant's constitutional right is to know the offense with which he is charged, not to know the details of how it will be proved." *United States v. Kendall*, 665 F.2d 126, 135 (7th Cir. 1981).

This is particularly true in cases where the information requested is peculiarly within the defendant's own knowledge. Agostino would have liked the Government, at the grand jury stage, to have revealed more specific information about how it planned to prove the intent element. Specifically, Agostino wanted to know what business or transaction the Government would allege he was trying to influence. If this information was memorialized in the indictment, the Government would be tied to that argument. No one knows why Agostino gave Goetz $4,000 better than Agostino does. To require the Government to articulate and be bound to a particular theory at this early stage in the proceedings is neither constitutionally nor statutorily required, and we decline to craft a judicial rule imposing such a requirement.

B. Governmental Interference with a Witness

Agostino next argues that his rights to due process were violated by governmental interference with a key witness. Agostino asserts that Assistant United States Attorney ("AUSA") Donald Schmid requested that Goetz refrain from speaking with defense counsel about the case. The Government counters that it never instructed Goetz not to speak with defense counsel but instead simply informed Goetz of his right to decline interviews with the defense.

"[T]he inability of a defendant to interview witnesses is a constitutional problem only if the state artificially restricted the defendant's ability to obtain evidence." *United States v. DeRobertis*, 766 F.2d 270, 274 (7th Cir. 1985). Since a witness is free to decide whether to grant an interview with defense counsel, *see United States v. Bowens*, 318 F.2d 828, 829 (7th Cir. 1963); *see also United States v. Pinto*, 755 F.2d 150, 152 (10th Cir. 1985); *United States v. Fischel*, 686 F.2d 1082, 1092 (5th Cir. 1982), reversal on the ground of governmental interference with a witness "requires a clear showing that the government instructed the witness not to cooperate with the defendant." *United States v. White*, 454 F.2d 435, 439 (7th Cir. 1971).

As identified by the district court, the "threshold question" is whether Agostino has "clearly shown" the Government instructed Goetz not to discuss the case with defense counsel. In support of its claim, Agostino cites to a letter dated November 26, 1996 from Goetz's counsel, David P. Jones, to defense counsel. The letter states, in pertinent part: "After Mr. Goetz's Grand Jury testimony, U.S. Attorney Schmid asked Mr. Goetz, as a courtesy, not to discuss his testimony.

Attorney Schmid made it clear that he had no authority to command Mr. Goetz not to talk nor could he prevent Mr. Goetz from speaking about what happened." Jones also testified during a hearing on the issue in a manner that echoed the statements in his letter of November 26, 1996. Defense counsel argues that the letter and attorney Jones's testimony, coupled with the fact that Goetz refused to participate in interviews with defense counsel, establish that AUSA Schmid "instructed" Goetz not to speak with defense counsel in contravention of applicable case law.

The Government responds with a letter of its own, written the day after the letter proffered by Agostino. On November 27, 1996, the following statement was transmitted to Goetz from AUSA Schmid:

> You told me that you had indicated to your lawyer that you did not wish to meet with [defense counsel]. Let me reiterate what I told you. I told you that it was up to you whether you choose to meet with ... any of Mr. Agostino's defense lawyers. While you are free to meet with them, I told you that you had no obligation to meet with them. The choice is entirely yours.

Even were we to credit Agostino's version of events, however, he has not "clearly shown" that the Government violated his rights to due process. The characterization of Schmid's actions in the November 26 Jones letter suggests that, in the worst light, Schmid *requested* that Goetz not speak to *anyone* about his testimony. Governmental interference occurs when the Government *instructs* the witness not to speak, *see White*, 454 F.2d at 439, or *artificially restricts* defense counsel access to the witness. *See DeRobertis*, 766 F.2d at 274. The one

line characterization of Schmid's actions in Jones's letter is a far cry from the "clear showing that the government instructed the witness not to cooperate with the defendant," *White*, 454 F.2d at 439, that is required for reversal on the grounds of governmental interference. Agostino has failed to make the requisite showing to establish a violation of his rights to due process.

C. Sufficiency of the Evidence

Agostino also attacks the weight of the evidence presented at trial. First, he argues that the evidence was insufficient to prove that he acted corruptly or with the intent to influence or reward Goetz. Second, he asserts that the evidence failed to establish the jurisdictional prerequisite to § 666. Agostino bears a "heavy burden" in pursuing these sufficiency of the evidence claims. *See United States v. Briscoe*, 65 F.3d 576, 586(7th Cir. 1995). The question in reviewing these claims is whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319(1979). An appellate court will overturn the verdict only if the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. *See United States v. Hickok*, 77 F.3d 992, 1002 (7th Cir.), *cert. denied*--U.S.--, 116 S. Ct. 1701(1996); *United States v. Crowder*, 36 F.3d 691, 695 (7th Cir. 1994).

1. Sufficiency of the Evidence with Respect to Intent Element

It is undisputed that Agostino offered Goetz $4,000 in cash in July 1995. The issue centers around his intent in offering the cash payment. While the Government asserts that

the payment was made in an attempt to influence or reward Goetz, the defense argues that Agostino was simply engaging in a test of Goetz's honesty. If there is any evidence from which a reasonable jury could have found that Agostino was attempting to influence or reward Goetz, then the verdict must stand. *See Hickok*, 77 F.3d at 1002.

The Government presented sufficient circumstantial evidence for a reasonable jury to conclude that Agostino corruptly offered the money to Goetz in an attempt to influence or reward him in connection with Toll Road business. The Government established that the money was passed at approximately the same time as Agostino in violation of the contract, turned over to Gas City the responsibility for selecting the survey stations for fuel pricing on the Toll Road. Agostino also offered the money to Goetz shortly after he informed Goetz that Gas City would receive non-revenue passes for all of its fuel tankers. While not in violation of the contract, Gas City received these passes much earlier than Goetz had expected they would. The Government presented evidence that established that Goetz had objected and expressed surprise at these developments, and shortly thereafter, Agostino offered him $4,000 in cash for "doing a good job." A reasonable jury could have found that this timing provided circumstantial evidence that Agostino offered Goetz the money with the requisite corrupt intent to establish a violation of § 666(a)(2).

The jury also has the choice to disbelieve the defendant's testimony regarding his intent. Agostino testified that he used his own money to test Goetz's honesty, did not discuss this test with anyone else, and performed this test without any consultation with the appropriate INDOT or Toll Road personnel. Yet Agostino gave Goetz a glowing annual review at approximately the same time he claimed to be having doubts

about Goetz's trustworthiness. Agostino also did not document his suspicions until December 1995, nearly six months after the incident, but only two days after INDOT Toll Road Division was subpoenaed for documents involving the $4,000 payment and the benefits passed to Gas City around the time of the payment. A reasonable jury could have found, on the basis on this evidence, that Agostino's explanation was not credible and that the money was to influence or reward Goetz in connection with the Gas City transactions.

2. Sufficiency of the Evidence with Respect to the Federal Funding Element

Agostino also challenges the sufficiency of the evidence regarding the $10,000 funding element. Section 666 requires that the person bribed be an "agent" of an organization, government, or agency that receives in excess of $10,000 from the federal government within a one year period. *See* 18 U.S.C. § 666(a)(2). (b). Under the statute, an "agent" is "a person authorized to act on behalf of another person... and ... includes a servant or employee, and a partner, director, officer, manager, and representative." *Id* § 666(d)(1). If the Government produced any evidence from which a reasonable jury could conclude that Goetz was an agent of an organization that received the requisite federal funding, we will not disturb the verdict. *See Hickok*, 77 F.3d at 1002; *Crowder*, 36 F.3d at 695.

It is undisputed that INDOT receives more than $10,000 from the federal government in any one year period. Agostino argues, however, that Goetz was an agent solely of INDOT Toll Road Division and not an agent of INDOT. We reject this contention. The evidence presented to the jury was sufficient for a reasonable jury to conclude that as an agent of INDOT Toll Road Division, Goetz was also an agent of INDOT.

First, the Government produced evidence that the Toll Road Division is simply a subpart of INDOT, not an independent organization. Government Exhibit 14 is an organizational chart that clearly identifies the Toll Road Division as a subdivision of INDOT. Both the Commissioner of INDOT and the Interim Toll Road Division Manager testified that the Toll Road Division was a subdivision of INDOT. Additionally, Toll Road Division employees are counted as part of the INDOT workforce when INDOT establishes how many people it employs.

Second, the Government presented evidence that established INDOT exercises management authority over the Toll Road Division. The INDOT Commissioner conducts meetings with heads of the divisions within INDOT, including the Toll Road Division, every four to six weeks. There was also evidence to suggest that INDOT exercises control over Toll Road personnel decisions. In regard to the Gas City contract at issue in this case, the INDOT Commissioner testified that he was personally involved in the bid preparation for the fuel supplier on the Toll Road as were INDOT's legal staff, Chief Financial Officer, Chief Engineer, and Public Relations Officer. The Gas City contract, under which Goetz was responsible for selecting survey stations, is signed by the INDOT Commissioner. Additionally, several witnesses testified that the INDOT Commissioner gave directions, orders and advice regarding the implementation of the Gas City contract.

Third, the Toll Road Division receives support from other INDOT divisions. INDOT's Internal Affairs Division deals with problems at the Toll Road. The Toll Road Division goes to INDOT for labor management and labor relations advice and receives support from INDOT's Public Affairs and Procurement Divisions.

In sum, the Government produced sufficient evidence to establish that Goetz, as an employee of the Toll Road Division, was also an employee of INDOT and therefore an agent of INDOT under the statutory definition. *Accord United States v. Moeller*, 987 F.2d 1134 (5th Cir. 1993) (finding that employees of Texas Federal Inspection Service (TFIS) were agents of Texas Department of Agriculture (TDA) because TDA supervised TFIS, and TFIS performed discretionary functions for TDA and enforced regulations promulgated by TDA).

D. Challenge to Jury Instructions

Agostino next challenges the court's instructions to the jury regarding the federal funds element, arguing that the district court erred by not providing the jury with the text of allegedly relevant Indiana statutes set forth in defendant's tendered instruction number four. The defense contends that the statutes were necessary to enable the jury to determine whether Goetz was an agent of an agency that received the requisite federal funding. We review jury instructions as a whole, asking whether they were "sufficient to inform the jury correctly of the applicable law." *Wilson v. Williams*, 83 F.3d 870, 874(7th Cir. 1996); *see also Maltby v. Winston*, 36 F.3d 548, 560(7th Cir. 1994). "In this review we avoid fastidiousness and inquire only whether the correct message was conveyed to the jury reasonably well." *Wilson*, 36 F.3d at 874; *see also United States v. Perez*, 43 F.3d 1131, 1137(7th Cir. 1994). We will reverse only if, "`considering all the instructions, the evidence and the arguments,' it appears that `the jury was misled... [and its] understanding of the issues was seriously affected to the prejudice of the complaining party.'" *Roggow v. Mineral Processing Corp.*, 894 F.2d 246, 248 (7th Cir. 1990) (alteration in original) (quoting *Simmons v. Pinkerton's, Inc.*, 762 F.2d 591, 597 (7th Cir. 1985)); *see also United States v. Hall*, 109

F.3d 1227, 1237(7th Cir.), *cert. denied*--U.S.--, 113 S. Ct. 153 (1997); *Perez*, 43 F.3d at 1137.

The district court instructed the jury as follows:

> In order to establish the offense of bribery, the government must prove the following elements beyond a reasonable doubt:
>
> > First, that the defendant offered, gave, or agreed to give anything of value to another person;
> >
> > Second, that the defendant did so corruptly with intent to influence or reward an agent of a state agency in connection with any business, transaction or series of transactions of that agency involving a thing of value of $5,000 or more; and
> >
> > Third, that the state agency involved must have received, in a one-year period, in excess of $10,000 in federal funds or benefits.....

It is not required that each division or subpart of a state agency receive any federal funds or benefits. All that is required is that the state agency have received at least $10,000 in federal funds or benefits in any one-year period.

This last paragraph is an accurate statement of law *if* the

agent in question is an agent of the state agency itself and not just an agent of a division or subpart of that agency. *See Moeller*, 987 F.2d at 1137 ("[S]o long as the agency received $10,000 per year from a federal assistance program, its agents are subject to section 666.") The uncontroverted evidence in this case established that Goetz was an employee of INDOT, and therefore under the statutory definition, he was an agent of INDOT.[3] The jury instruction therefore was "sufficient to inform the jury correctly of the applicable law." *Wilson*, 83 F.3d at 874. Agostino's challenge to the jury instruction is therefore denied.

E. Application of U.S.S.G. § 2C1.1 to Calculate Agostino's Base Level

Agostino's final argument on appeal is that the district court erred in sentencing him under U.S.S.G. § 2C1.1 instead of U.S.S.G. § 2C1.2. Appendix A to the Sentencing Guidelines directs that either U.S.S.G. § 2C1 .1 or § 2C1 .2 is applicable to convictions under 18 U.S.C. §666(a)(2). "When the statutory index lists more than one potentially applicable guideline, the district court is charged with choosing from among the

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[3]While the defense submitted evidence that the Toll Road Division was operated as a separate entity from INDOT in accordance with Indiana state statutes, the defense did not present evidence controverting that INDOT had management authority over the Toll Road Division, that Goetz implemented the Gas City contract which was signed by the Commissioner of INDOT, or contradicting any of the other evidence from which a reasonable jury could have concluded that Goetz was an agent of INDOT.

guidelines specified the one that is most appropriate based on the nature of the offense conduct." *United States v. Moeller*, 80 F.3d 1053, 1061(5th Cir. 1996) [hereinafter *Moeller II*).

The commentaries to the relevant sections explain that "[Section 2C1.1] applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions," U.S.S.G. § 2C1 .1, comment. (backg'd), while "[Section 2C1.2] applies to the offering, giving, soliciting, or receiving of a gratuity to a public official in respect to an official act. A corrupt purpose is not an element of this offense." U.S.S.G. § 2C1.2, comment. (backg'd). In choosing between these two guidelines, the issue before the district court was essentially whether Agostino's actions were more akin to providing a gratuity than to passing a bribe. U.S.S.G. § 2C1.2 would apply to the former case while U.S.S.G. § 2C1.1 would apply to the latter. As this is a factual determination, we review for clear error. *See United States v. Emerson*, --F.3d--, No.96-3166, 1997 WL 643634, at *4 (7th Cir. Oct.20, 1997); *United States v. Yoon*, --F.3d--, No.96-2943, 1997 WL 634185, at *13 (7th Cir. Oct.15, 1997).

The distinction between a bribe and a gratuity is sometimes difficult to discern. This difficulty arises because the distinction, in many cases, will turn on the intent of the payer. If the payer's intent is to influence or affect future actions, then the payment is a bribe. If, on the other hand, the payer intends the money as a reward for actions the payee has already taken, or is already committed to take, then the payment is a gratuity. *See United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993). In the present case, Goetz was unable to say with certainty what Agostino's intent was. Goetz testified that he did not know what he was supposed to do for the money offered to

him by Agostino. Goetz himself did not know if he was being rewarded for something he did in the past or if he was being bribed to do something in the future. The Government hypothesized that he may have been bribed *not* to do something in the future--specifically, to not cause any trouble with regard to the benefits being passed to Gas City.

Given the somewhat confused state of evidence regarding Agostino's intent, we cannot conclude that the district court committed clear error in sentencing Agostino under U.S.S.G. § 2C1.1. The district court was privy to the testimony and argument regarding Agostino's intent first hand, and it is therefore more appropriate for it to determine whether the money was offered with a corrupt purpose. *See Moeller II*, 80 F.3d at 1062 ("We decline to substitute our own more detached assessment of the extensive evidence presented by both parties for the judgment of the district ....."). In addition, the jury must have believed that Agostino acted corruptly because the statute under which Agostino was convicted requires a corrupt purpose. *See* 18 U.S.C. § 666(a)(2) (requiring that defendant "*corruptly* gives, offers, or agrees to give anything of value") (emphasis added). Considering this requirement for conviction under the statute as well as the district court's privileged position with regard to the testimony and arguments, the district court's application of U.S.S.G. § 2C1.1 was not clearly erroneous. *Accord Mariano*, 983 F.2d at 1159 (holding that district court did not commit clear error in sentencing defendants under U.S.S.G. § 2C1.1 because defendants sought to receive quid pro quo and "since the offenses to which they pleaded guilty [violations of 18 U.S.C. § 666(a)(2)] involved corrupt intent").

E. Government's Cross-Appeal

We review a sentencing court's factual determinations for clear error and its application of the Sentencing Guidelines *de novo*. *See Emerson*, 1997 WL 643634, at *4; *Yoon*, 1997 WL 634185, at *13.

1. Upward Departure for Benefit of Bribe

Sentencing Guideline § 2C1.I(b)(2)(A) provides:

> If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase [the base offense level] by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

U.S.S.G. § 2C1.1 (1))(2)(A). The district court, finding that "the defendant did not receive any benefit, nor did he intend to receive a benefit," used the value of the payment, $4,000, to impose a one-level increase in the base offense level. The Government makes two closely-related arguments. First, the Government suggests that the district court should have considered the benefit to Gas City. Second, the Government argues that the district court made an error of law in holding that the defendant must have personally received the benefit in order to merit an upward departure.

The Government first argues that the benefit that accrued to Gas City should be considered in the calculation of benefit. Agostino counters that the Sentencing Guidelines did not contemplate benefits accruing to third parties in factual situations like the present case. Agostino cites to the background section of U.S.S.G. § 2C1 .1, which he claims is

"very telling" as to what the Guideline Commission had in mind. In discussing whether the value of the bribe itself should be deducted from the benefit received, the background section states, "for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher." U.S.S.G. § 2C 1.1, comment. (backg'd) (emphasis added). Accordingly, the defense asserts that for the purpose of the enhancement, the court can only look to the benefits to the *payer* or the *recipient*. Since Gas City is neither a payer nor a recipient, the defense argues, the court cannot consider any benefits accruing to it.

There is some precedent suggesting that the sentencing court may consider benefits flowing to third parties in determining benefit/loss under U.S.S.G. § 2C1.1. *See United States v. Pretty*, 98 F.3d 1213 (l0th Cir. 1996), *cert. denied* -- U.S.--, 117 5. Ct. 2436(1997); *see also United States v. Muldoon*, 931 F.2d 282 (4th Cir. 1991) (by implication).[4] However, these cases are factually distinguishable from the present case. In *Pretty*, the defendants, Pretty and Whitehead, were charged with engaging in a bribery scheme in violation of 18 U.S.C. § 666, as well as conspiring to engage in this scheme

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[4]The other cases cited by the Government in its brief are inapplicable to the present case. One of the cases allows for enhancement for benefit to the payer, even if the defendant is someone other than the payer himself. *See United Stales v. Hang*, 75 F.3d 1275 (8th Cir. 1996) (defendant was payee). Since in the present case the defendant was the payer, and no benefit to him was shown, this case is not helpful. The other case cited by the Government is similarly unhelpful. *See United States v. Falcioni* 45 F.3d 24 (2d Cir. 1995) (decided based on loss to government; court does not reach issue of benefit).

in violation of 18 U.S.C. § 371. *See id.* at 1216. The jury convicted the defendants on all charges in the indictment. *See id.* at 1217. One of the conspirators, Kuhse, was not before the court in the case. In determining the appropriate base level, the sentencing court considered the benefit to Kuhse, a conspirator. *See Id.* at 1222. The court found that the relevant question was "whether the amount received by Kuhse was reasonably foreseeable to the defendants," citing U.S.S.G. § lBI.3(a)(l)(B). *See id.*

Sentencing Guideline § lB1.3(a)(1)(B) states that specific offense characteristics shall be determined on the basis of the following:

> ....
> in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy)! all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

This section clearly requires "a jointly undertaken criminal activity," although it matters not whether such activity is formally charged as a conspiracy. This requirement makes the section inapplicable to Agostino. Unlike *Pretty*, in the case before us the Government did not provide evidence that Agostino was part of a jointly undertaken criminal activity." The only evidence to suggest such an endeavor is Goetz's testimony that Agostino told him the $4,000 was from Len

McEnery, Gas City's General Manager. Agostino contradicted this testimony in asserting that the money was his private money from a home equity line-of-credit. There is no additional evidence on the question of whether Agostino was involved in a jointly undertaken criminal activity, therefore this section and the precedent applying it is irrelevant.[5]

Other circuits have allowed sentencing courts to consider benefits flowing to organizations where the defendant is shown to be an agent of such organization. *See United States v. Dijan*, 37 F.3d 398 (8th Cir. 1994) (defendant was payer; court used benefit to payer-owned corporation, in whose interest payer acted); *United States v. Jackson*, 876 F.Supp. 1208 (D. Kan. 1994) payer-defendants were high-level employees of hospital; court found government failed to meet burden in proving benefit to hospital), *aff'd sub. nom. United States v. Martinez*, 76 F.3d 1145 (10th Cir. 1996). In the instant case, the Government asks the court to enhance the defendant-

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[5]While the court in *Muldoon* did not explicitly reference this section, the facts of the case are similar to *Pretty*. In *Muldoon*, the defendant acted as a middleman, passing bribes from one corporation to a government agent. See 931 F.2d at 284-85. The defendant was charged and convicted of the substantive offense, as well as conspiracy to commit the substantive offense. *See id.* at 284. The evidence clearly established that the defendant was acting on behalf of the corporation in passing the bribes. *See id.* at 288. Therefore the case is distinguishable and inapplicable for the same reasons stated above. Additionally, the court in *Muldoon* used the value of the bribe, not the value of the benefit received, because it found that the evidence did not disclose the value of the benefit. *See id.* At 289.

payer's base level based on benefits to an *unrelated* third party. If the Government had shown that Agostino acted as Gas City's agent in this transaction, these cases may be relevant. However, as above, the only evidence on that count is Goetz's testimony that when prodded, Agostino told him the $4,000 was from Len McEnery of Gas City. Agostino contradicts this claim by asserting that the money was his own that he kept in his home. Thus, this theory fails as well. In sum, the precedent establishes that benefits to third parties may be considered in certain factual circumstances, but the Government did not establish the necessary circumstances in this case.

The flip-side of the Government's argument that the benefits to Gas City should have been considered is its argument that the district court erred as a matter of law in holding that the defendant must have personally benefitted in order to merit an enhancement. It is true that some of our cases establish the proposition that the defendant need not receive the benefit in order to have his sentence enhanced. *See United States v. Muhammad*, --F.3d--, No.96-2434, 1997 WL 406304 (7th Cir. July 21, 1997) (holding that benefit to payer may be considered in enhancing sentence of defendant-payee). The Government's contention that the district court erred as a matter of law is unpersuasive, however, as it is based on an erroneous interpretation of the reach of the conclusion embodied in the district court's sentencing memorandum. Although the district court did not explicitly analyze the third party question, its statement of the law as it relates to the facts of this case was correct. In the present case, where there is no established link between the defendant and the third party that received the benefit, the appropriate measure of the benefit is the amount of personal benefit to the defendant. Because the Government did not establish that Agostino received a. benefit, the district court correctly declined to use any benefit as the measure for

enhancement under U.S.S.G. § 2C1.1 (b)(2)(A). We therefore find that under the unique facts of this case, the district court did not err in using the value of the bribe, and not the value of the benefit to Gas City, to determine the upward enhancement under U.S.S.G. § 2C1.1(b)(2)(A).

2. Enhancement for Obstruction of Justice

The Government argues that the district court erred in failing to impose a two-level increase in Agostino's sentence under the obstruction of justice guideline, U.S.S.G. § 3C1.1.[6] Sentencing Guideline § 3C11 states that a sentencing court shall increase the defendant's base offense level by two if he "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Perjury can be the basis for such an enhancement. *See* U.S.S.G. § 3C1.1, comment. (n.3(b)). A defendant commits perjury for the purpose of this provision if he "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

The district court's determination regarding whether the defendant willfully committed perjury, and therefore deserves the sentence enhancement, is a factual finding we review for

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[6]While at sentencing the Government offered several reasons for an obstruction of justice enhancement, in its appeal the Government focuses on the claim of perjury. We therefore devote our discussion to the perjury issue.

clear error. *See Emerson*, 1997 WL 643634, at *4; *Yoon*, 1997 WL 634185, at *13. "Special deference is given to findings based upon credibility determinations, which `can virtually never be clear error.'" *Hickok*, 77 F.3d at 1007 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1 985)). At the outset we note that the district court is "in the best position to evaluate [Agostino's] truthfulness," *United States v. Easley*, 977 F.2d 283, 286 (7th Cir. 1992), and we are reluctant to overturn the district court's finding on this issue.

Although Agostino did not testify at trial, portions of his grand jury testimony were read into the record. While there are statements within the proffered grand jury testimony that were contradicted by other witnesses and circumstantial evidence, the district court determined that "there are no facts in the record that prove the defendant committed perjury." Specifically, the district court found that there was "no proof of the requisite `willfulness.'"

The Government asserts that Agostino lied by testifying to the following things: (1) that he did not state to Goetz that the $4,000 was PAC money or from "Lenny," (2) that it was Goetz's idea to give nonrevenue passes to Gas City, (3) that the day after giving Goetz the $4,000, he told Goetz that the $4,000 was his (Agostino's) personal money, and finally (4) that the money was given as a test of Goetz's honesty. With respect to issues (1) through (3), the testimony breaks down to a "he said/he said" credibility battle. Agostino testified as outlined above, while Goetz testified to the opposite. The mere fact that Agostino's testimony before the grand jury conflicted with the testimony of other witnesses at trial does not require a finding of obstruction of justice, however. The obstruction of justice enhancement requires a finding of willfulness, and, as the Supreme Court noted in *Dunnigan*, "an accused may give

inaccurate testimony due to confusion, mistake, or faulty memory." *Dunnigan*, 507 U.S. at 95. Thus not all inaccurate testimony necessarily reflects a *willful* attempt to obstruct justice. Because the district court has the best perspective to judge issues of credibility, the district court's refusal to find Agostino's testimony perjurious is not clearly erroneous.

Additionally, while the question of intent (issue (4)) was central to the trial, Agostino's testimony with regard to his intent in giving Goetz the $4,000 is not so clearly perjurious that we will overturn the district court's determination. Agostino testified before the grand jury that

> [M]y intent was that, when I presented him with the envelope, that he would come forward, either, one, feel guilty and automatically tell me if he was up to anything, or two, that when he suggested various companies, et cetera, narrow down the possible field, give me something further that I could look into basically at that point to go forward.

It is at least possible that Agostino did have this intent when he passed the money to Goetz *in addition* to a corrupt intent to influence or reward Goetz. The circumstantial evidence tending to show corrupt purpose, combined with the jury's verdict, which required a finding a corrupt purpose, do not conclusively establish that Agostino committed perjury. *See Dunnigan*, 507 U.S. at 94 ("[N]ot every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1 .1 for committing perjury."); *United States v. Buchanan*, 115 F.3d 445, 451(7th Cir. 1997) (finding that "[t]o the extent that [prior] cases affirmed sentencing enhancements merely on the basis of a verdict that was inconsistent with the defendant's testimony,

they are no longer authoritative after *Dunnigan*"). While we recognize this scenario is unlikely, and admit that the facts of this case present a close call, we cannot say that we have "`the definite and firm conviction that a mistake has been committed.'" *United States v. Hassan*, 927 F.2d 303, 309 (7th Cir. 1991) (quoting *Anderson*, 470 U.S. at 573). Therefore, we cannot conclude that the district court committed clear error in refusing to enhance Agostino's sentence for obstruction of justice.

3. Discrepancy Between the Oral Sentence Pronounced and that Directed by the Sentencing Memorandum

At sentencing, the district court set Agostino's offense level at eleven, which placed him in Zone C of the sentencing table. The sentencing range for a total offense level of eleven and a Criminal History Category I is from eight to fourteen months. Under U.S.S.G. § 5C1.1 (d)(2)

> If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --
>
> ....
>
> a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

The district court then orally announced the following sentence in the defendant's presence: "four months imprisonment in a jail located in Indiana or Illinois, to be designated by the United States Marshall or by the United States Bureau of Prisons....

This confinement is to be followed by three years of supervised release and the standard conditions are to apply." A fine and a special assessment was also imposed.

As noted by AUSA Schmid at the sentencing hearing, the orally announced sentence does not conform to the Guidelines because it imposes only four months confinement rather than the eight month minimum required by the Guidelines. While the sentence imposes three years of supervised release, it does not contain the necessary "condition that substitutes community confinement or home detention according to the schedule in subsection (e)" for the remaining four months of the minimum sentence. U.S.S.G. § 5C1.l(d)(2).

The sentencing memorandum does bring the sentence within the appropriate sentencing range:

> This court hereby sentences this defendant to eight (8) months, four (4) months of which will be served, in a jail located in Illinois or Indiana to be designated by the United States Marshall or the United States Bureau of Prisons. The remaining four (4) months will be included in the term of supervised release pursuant to §5C 1.1 (d)(2). . . . The confinement is to be followed by three (3) years supervised release.

It still does not specify, however, whether the "remaining four (4) months" are to be spent in community confinement or home detention. Additionally, this description seems to include the remaining four months within the three years of supervised release.

Finally, in the judgment and commitment order issued

to the U.S. Marshall, the sentence imposed is described as follows:

> The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Eight (8) months imprisonment, 4 months served in a prison and the remaining 4 months in community confinement.... Upon release from imprisonment and community confinement, the defendant shall be on supervised release for a term of Three (3) years.

This version of the sentence clarifies that the remaining four months will be spent in community confinement but seems to state that the three years of supervised release begin *after* the four months of community confinement (as opposed to the sentencing memorandum, which indicated that the four months of community confinement would "be included in the term of supervised release").

When a discrepancy exists between an oral and written sentence, the oral sentence controls. *See United States v. Daddino*, S F.3d 262, 266 & n.5 (7th Cir. 1993) (collecting cases); *United States v. Makres*, 851 F.2d 1016, 1019(7th Cir. 1988). This result is demanded by Fed. R. Crim. P.43(a), which has as its source the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments *See United States v. Gagnon*, 470 U.S. 522 (1985); *see also* Fed. R. Crim. P.43(a) ("The defendant shall be present... at the imposition of sentence...."). In this case the oral sentence imposed is contrary to the Sentencing Guidelines because it provides only for four months of confinement--four months less than the minimum eight months

dictated by the applicable Guideline range. From the sentencing memorandum and judgment and commitment order it appears that the district court's intent was to impose the minimum eight months of confinement--but something got lost in the translation. Because the district court departed below the applicable guideline range in its orally pronounced sentence we are required to remand the case for resentencing.[7] Because we remand for resentencing, we need not address the questions presented by the discrepancy between written sentences, but we are confident consistency will be achieved on remand.

G. Conclusion

We reject Agostino's appeals, and therefore his conviction is AFFIRMED. With regard to the sentencing issues, we find that the district court did not err in the application of the Sentencing Guidelines or in the determination regarding enhancements. However, because the orally announced was below the minimum set by the Sentencing Guidelines, we REMAND for resentencing consistent with this opinion.

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[7]Because the defendant has a constitutional right to be present for sentencing, we cannot allow the sentencing memorandum or judgment papers to control. Were we to allow such a result, the defendant would effectively be sentenced in absentia.

APPENDIX B

Text of 18 U.S.C. § 666

18 U.S.C. § 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization

or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to a bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section--

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of

government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.